IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 17.12.2007

CORAM

THE HONOURABLE MR. JUSTICE S.J.MUKHOPADHAYA
AND
THE HONOURABLE MS. JUSTICE K.SUGUNA

W.P. NO. 9160 OF 2007
AND
M.P. NO. 2 OF 2007

T.Chitra .. Petitioner

- Vs -

1. The Chief Secretary to Government
Government of Tamil Nadu
Fort St. George
Chennai 600 009.

2. The Secretary
Justice K.P.Sivasubramaniam
Commission of Inquiry
Coouam House
Omandurar Government Estate
Swamy Sivananda Salai
Chennai 600 002. .. Respondents

Writ Petition filed for the issuance of a Writ of Certiorari calling for the records pertaining to the appointment of Justice Thiru. K.P.Sivasubramaniam as constituted in G.O. Ms. No.742, Public (Law and Order -F) Department dated 27.7.2006 published in Tamil Nadu Government Gazette Extraordinary No.177 dated 27.7.2006 in Part-II - Section 2 and quash the same.

For Petitioner : Mr. N.Jothi for M/s.Senthilnathan

For Respondents : Mr. R.Viduthalai, AG, assisted by
Mr. D.Sreenivasan, AGP for R-1
Mr. K.Elango, Spl. G.P. For R-2

ORDER

S.J.MUKHOPADHAYA, J.

This writ petition was preferred by the petitioner against G.O. Ms. No.742, Public (Law & Order - F) Department, dated 27th July, 2006, published in the Tamil Nadu Government Gazette Extraordinary No.177 dated 27th July, 2006, in Part-II - Section 2, whereby one man Commissions of Inquiry of Justice Thiru.K.P.Sivasubramaniam was constituted to inquire into the allegations of fraudulent grabbing of land assigned to Adi Dravidar (S.C.) and landless poor in

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Siruthavur Village, Chengalpet Taluk, Kancheepuram District under the Commissions of Inquiry Act, 1952.

2. The main grounds of challenge as noticed by learned single Judge, who referred the matter for hearing by Division Bench are :-

> "a) Only the State Government or the Central Government as the case may be can appoint a Commission for public purpose under the Act and not the Department or a Secretary.
>
> b) The Government under law means not a single individual Department or the Chief Secretary, but the Council of Ministers.
>
> c) The word State Government does not mean a Single Department of the Government, namely, the Public Department, which has issued the impugned notification through the first respondent, but the collective wisdom of the Council of Ministers should be reflected in the decision taking process both in respect of identifying the purpose for which the Commission to be appointed, the approval of terms of reference, the identification of the name of the Judge to head the Commission are all to be brought as an Agenda and listed before the Council of Ministers in the Cabinet Meeting. But in this case no cabinet meeting has even taken place nor any discussion took place among the Council of Ministers with respect to the Constitution of the Commission and as such the impugned notification is liable to be quashed."

3. According to Mr.Jothi, learned counsel for the petitioner, though Section 3 of the Act authorise the appropriate Government to appoint a Commission upon a resolution in this regard, being passed in the Legislative Assembly, but admittedly no such resolution has been passed by the Tamil Nadu Legislative Assembly. One statement was made in the Assembly under rule 110 of the Tamil Nadu Assembly Rules by the Chief Minister, which is different from the resolution of the Assembly and, therefore, the impugned Government Order is liable to be quashed.

The petitioner has been issued with a notice of summons u/s 8-B of the Act and according to the petitioner she will be prejudiced by the order of the Commission if it is allowed to be continued and for that she has preferred the writ petition.

Counsel for the petitioner submitted that the impugned Government Order has not been expressed in the name of the Governor as required under the law and, thus, it cannot be termed to be a notification under Article 166 (1) of the Constitution of India read with Rule 12 of the Rules of Executive Business. It having not been exercised in the name of the Governor in the manner it should be done, it is fit to be set aside.

Under Rules of Executive Business, no provision having been made in regard to appointment of Commission under the Commission of Enquiry Act, 1952, the matter should have been placed before the cabinet, which was not placed in the present case. Further,

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according to the learned counsel for the petitioner, neither the Chief Minister nor an individual Minister could exercise power under Article 166 (1) of the Constitution of India.

4. Reliance was placed on Section 2-A relating to definition of "appropriate Government", which includes the State Government in relation to commission appointed by it to make an enquiry into any matter relating to any of the entries enumerated in List-II or List-III under the 7th Schedule of the Constitution. It was submitted that word "State Government" does not mean a single department of the Government, such as Public Department, which has issued the impugned notification, but collective wisdom of council of ministers should be reflected in the decision making process, both in respect of identifying the purpose for which Commission is to be appointed, approval of terms of reference, the identification of the name of the Judge to head the Commission, etc., are all to be brought as agenda for listing before the council of ministers in the cabinet meeting. In the absence of the same, the term "appropriate Government", which alone could appoint a Commission in terms of Section 3 is not within the purview of the Act. Only a statement under Rule 110 of the Tamil Nadu Legislative Assembly Rules was made by the Portfolio Minister (Chief Minister) in the Tamil Nadu Legislative Assembly, which cannot validate the order.

Learned counsel for the petitioner further submitted that it was not a matter of so great public importance to take up the matter urgently without placing the matter before the cabinet. The legal opinion was obtained from the Advocate General on the spot inasmuch as the Advocate General was stated to be accidentally available by then. According to him, the events that has taken place on 6th July, 2006, are highly motivated by political considerations.

Referring to the facts, learned counsel for the petitioner submitted that the facts alleged in terms of reference relating to land grabbing in Siruthavur Village, Chengalpet Taluk, Kancheepuram District, is not only false, but it relates back to transactions that took place more than 40 years back. The sale deeds were, in fact, executed in favour of the petitioner and possession was taken more than 40 years back with the consent of the vendors in a legal manner, but without taking into consideration the aforesaid facts and the prescription of limitation, giving a colour of grabbing of land, the respondents intended to open an issue not permissible under the law. All these matters relating to transfer of land cannot be decided nor a declaration could be given by the Commissioner, which could be determined only by a civil court of competent jurisdiction. According to him, as the matter relates to events beyond 40 years, there is remedy available to the aggrieved persons, the Government has not taken action till date and, therefore, there was no matter of public importance to refer the matter, except political vendetta, as is reflected. It may be a matter of political importance, but not a matter of administrative importance. He relied on decisions of the Supreme Court and some other High Courts, which will be discussed at the appropriate stage.

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5. The following were the submissions as were made by the learned Advocate General on behalf of the State of Tamil Nadu :-

a) The provisions of Article 166 was fully complied with and the order has been authenticated in the manner as required under the law.

b) The provision of Article 166 is not mandatory, but directory.

c) Infraction, if any, of Article 166, as alleged, will only take away the immunity from judicial scrutiny, which could be looked into by the Court, but that will not invalidate the order if the State has discharged its onus when the order is otherwise validly made.

d) The constitution of the Commissions of Inquiry into the facts and circumstances of the present case is a matter related to public order, which is dealt with by the Public Department and allocated to the Hon'ble Chief Minister and as such the Chief Minister is fully authorised under the Rules of Executive Business to deal with the matter and pass appropriate order.

He also relied on Supreme Court decisions in support of his arguments.

6. We have heard the parties and noticed the rival contentions as recorded above. From the impugned G.O. Ms. No.742, it will be evident that the Commissions of Inquiry was appointed to enquiry into the cause and circumstance resulting in alleged fraudulent land grabbing from Adi Dravidar and landless poor of Siruthavur Village, Chengalpet, Taluk, Kancheepuram District, on the basis of representation received along with petition from the Communist Party of India (Marxist), Tamil Nadu State Committee, dated 26th July, 2006. As the reference made cannot be looked into or determined by this Court under Article 226 of the Constitution of India, it is not desirable nor possible for us to decide whether the lands were sold by the vendors and possession were taken by the vendee more than 40 years back.

7. The only question which could be determined in the present case is whether the G.O. Ms. No.742 Public (Law & Order - F) Department, dated 27th July, 2006, requires interference by this Court.

8. Section 3 of the Commissions of Inquiry Act, 1952, fell for consideration before the Supreme Court in P.Janardhana Reddy - Vs - State of A.P. Reported in 2001 (6) SCC 50. In the said case, the Supreme Court held that the appointment of a Commission is a matter at the discretion of the appropriate Government, such an appointment is made primarily for the purpose of information of the Government, the Commission does not adjudicate on any matter; its report has no value per se, excepting giving advise and providing guidance to the Government. It is mandated under sub-section (1) of Section 3 of the Commissions of Inquiry Act that the appropriate Government may, if it is of the opinion that it is necessary so to do, appoint a Commissions of Inquiry for the purpose of making an enquiry into any definite matter of public importance and performing such functions and within such time as may be specified under the notification and

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the Commission so appointed usually make the enquiry and perform the functions accordingly.

That was a case in which the Chief Minister of the State expressed on the floor of the State Legislature that he had no objection to appoint a Commissions of Inquiry under the Act to enquiry into the serious allegations regarding irregularities in payment of compensation for the acquired lands. This was followed by the categorical statements of the Advocate General, who was representing the State before the High Court. The Supreme Court having noticed the aforesaid fact observed that in view of such statement made by the Chief Minister, it is reasonable to presume that he had given necessary thought to the matter and on being satisfied that it is necessary so to do, expressed his agreement for appointment of a Commissions of Inquiry under the Act. The statement was held to be made on behalf of the State Government.

9. In view of the fact that the appointment of a Commission is made primarily for the purpose of information of the Government and the Commission does not adjudicate on any of the matter, as held by the Supreme Court, we are of the view that the report as may be submitted by the Commissions of Inquiry will not amount to giving any declaration in respect to the lands in question nor could affect the right and title of the original owner.

10. The Tamil Nadu Government Business Rules and Secretariat Instructions has been framed in exercise of powers conferred by Clause 2 & 3 of Article 166 of the Constitution of India. Under Rule 4, the business of the Government has to be transacted in the department specified under the 5th Schedule and classified and distributed to those departments, as laid down therein. The transfer of subject from one department to another or allocation of a new subject to a department could be made under the orders of the Chief Minister only. Rule 11 prescribed that all orders or instructions made or executed or on behalf of the Government of the State shall be expressed to be made or executed in the name of the Governor. Rule 12 prescribed the authority, who could sigh such order, i.e., either by the Chief Secretary or Secretary or Special Secretary or Joint Secretary or Deputy Secretary or Under Secretary to the Government of the State. The authentication of such order or instruction has to be made "By Order and in the name of the Governor of Tamil Nadu". Under Rule 14, all cases referred to under the 2nd Schedule has to be submitted to the Chief Minister after consideration by the Minister in-charge with a view to obtaining his orders for the circulation of the case under Rule 15. Rule 35 (1) (a) stipulates the class of cases, which are required to be submitted to the Chief Minister before issuance of the order, including the cases raising question of policy and case of administrative importance not already covered by the 2nd Schedule.

The aforesaid provisions have been made including the issuance of orders and instruments by or on behalf of the Governor of the State as in accordance with Article 166 of the Constitution of India.

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11. The provision of Article 166 of the Constitution fell for consideration before a Constitution Bench of Supreme Court in the case of R.Chitralekha – Vs - State of Mysore reported in AIR 1964 SC 1823. That was a case in which letter was signed by the Under Secretary of the Selection Board communicating the decision by the Government to prescribe interviews for regulating admission to colleges. The validity of interview was challenged not on the ground that no such order by the Government existed, but on the ground that the letter was not issued in the name of the Governor. In the said case, the Supreme Court, giving reference to earlier cases, while held that the provision of Article 166 of Constitution are only directory and not mandatory in character, observed as follows :-

> "If the conditions laid down in this Article are complied with, the order cannot be called in question on the ground that it is not an order made by the Governor. It is contended that as the order in question was not issued in the name of the Governor the order was void and no interviews could be held pursuant to that order. The law on the subject is well settled. In Dattatraya Moreshwar Pangurkar v. State of Bombay, 1952 SCR 612 at p. 625 (AIR 1952 SC 181 at pp. 185-186), Das, J., as he then was, observed :-
>
> > "Strict compliance with the requirements of Article 166 gives an immunity to the order in that it cannot be challenged on the ground that it is not an order made by the Governor. If, therefore, the requirements of that Article are not complied with, the resulting immunity cannot be claimed by the State. This, however, does not vitiate the order itself ..... Article 166 directs all executive action to be expressed and authenticated in the manner therein laid down but an omission to comply with those provisions does not render the executive action a nullity. Therefore, all that the procedure established by law requires that the appropriate Government must take a decision as to whether the detention order should be confirmed or not under section 11 (1)."
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> The same view was reiterated by this Court in State of Bombay v. Purushottam Jog Naik, 1952 SCR 674 : (AIR 1952 SC 317) where it was pointed out that though the order in question there was defective in form it was open to the State Government to prove by other means that such an order had been validly made. This view has been reaffirmed by this Court in subsequent decisions : see Ghaio Mall and Sons v. State of Delhi, 1959 SCR 1424 : (AIR 1959 SC 65) and it is, therefore, settled law that provisions of Art. 166 of the Constitution are only directory and

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not mandatory in characted and, if they are not complied with, it can be established as a question of fact that the impugned order was issued in fact by the State Government or the Governor. The judgment of this Court in Bachhittar Singh v. State of Punjab, (1962) Supp. 3 SCR 713 : (AIR 1963 SC 395) does not help the appellants, for in that case the order signed by the Revenue Minister was not communicated to the party and, therefore, it was held that there was no effective order."

In another case of A.Sanjeevi Naidu, etc. - Vs - State of Madras reported in 1970 (1) SCC 443, the validity of a draft scheme was not challenged on the ground that the opinion was not formed by the State Government, but by the Secretary of the Government of a particular Department. In the said case, having noticed the provision of sub-article (3) of Article 166, a Constitution Bench of the Supreme Court observed as follows :-

"9. We think that the above submissions advanced on behalf of the appellants are without force and are based on a misconception of the principles underlying our Constitution. Under our Constitution, the Governor is essentially a constitutional head, the administration of State is run by the Council of Ministers. But in the very nature of things, it is impossible for the Council of Ministers to deal with each and every matter that comes before the Government. In order to obviate that difficulty the Constitution has authorised the Governor under sub-article (3) of Article 166 to make rules for the more convenient transition of business of the Government of the State and for the allocation amongst its Ministers, the business of the Government. All matters excepting those in which Governor is required to act in his discretion have to be allocated to one or the other of the Ministers on the advice of the Chief Minister. Apart from allocating business among the Ministers, the Governor can also make rules on the advice of his Council of Ministers for more convenient transaction of business. He cannot only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function. But this again he can do only on the advice of the Council of Ministers.

10. The cabinet is responsible to the Legislature for every action taken in any of the Ministries. That is the essence of joint responsibility. That does not mean that each and every decision must be taken by the cabinet. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Council of Ministers to discharge all or any of the Governmental functions. Similarly an individual Minister is responsible to the Legislature for every

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action taken or omitted to be taken in his ministry. This again is a political responsibility and not personal responsibility. Even the most hard working Minister cannot attend to every business in his department. If he attempts to do it, he is bound to make a mess of his department. In every well planned administration, most of the decisions are taken by the civil servants who are likely to be experts and not subject to political pressure. The Minister is not expected to burden himself with the day-to-day administration. His primary function is to lay down the policies and programmes of his ministry while the Council of Ministers settle the major policies and programmes of the Government. When a civil servant takes a decision, he does not do it as a delegate of his Minister. He does it on behalf of the Government. It is always open to a Minister to call for any file in his ministry and pass orders. He may also issue directions to the officers in his ministry regarding the disposal of Government business either generally or as regards any specific case. Subject to that over all power, the officers designated by the "Rules" or the standing orders, can take decisions on behalf of the Government. These officers are the limbs of the Government and not its delegates."

In the case of Samsher Singh - Vs - State of Punjab reported in AIR 1974 SC 2192, aforesaid view was reiterated by a Constitution Bench of the Supreme Court with the following observation :-

"48. The President as well as the Governor is the constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the constitutional sense in the Cabinet system of Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. The decision of any Minister or officer under Rules of Business made under any of these two Articles 77 (3) and 166(3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of a Minister or officer under the Rules of Business is the decision of the President or the Governor."

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(Emphasis Added).

In the case of State of M.P. - Vs - Dr. Yashwant Trimbak reported in 1996 (2) SCC 305, the Supreme Court even proceed to observe as follows :-

> "12. Even where an order is issued by Secretary of the Government without indicating that it is by order of the Central Government or by order of the President, this Court came to the conclusion that the immunity in Article 166(2) would be available if it appears from other material that in fact the decision had been taken by the Government. In Municipal Corpn. of Delhi v. Birla Cotton, Spg. and Wvg. Mills this Court came to the conclusion that in fact sanction had been given by the Central Government as required under the Act though the order did not indicate to be so."

12. In the present case, learned Advocate General produced the relevant file and certain similar notifications earlier issued by the State. We have seen the original order as was drafted and signed by the officials as also similar notifications, which were earlier issued. From the draft notification issued in the present case as also in the earlier cases, we find that while in the substantive part of the order it has been mentioned that the Governor of Tamil Nadu appoints a Commissions of Inquiry, in the end of the order, just above the signature of the concerned Secretary, it has been mentioned "By Order of the Governor". However, at the time while exact notification has been published, as it appears by way of precedence, the name of the Governor having reflected in the substantive part of the order, the sentence "By Order of the Governor", as appears in the draft notification was not printed all the time. Thus, it cannot be stated that it is only a solitary case in which "By Order of the Governor" was not printed in the exact notification, though other formalities has been complied with.

13. We have noticed the Supreme Court decisions as referred to above in the case of P.Janardhana Reddy - Vs - State of A.P. Reported in 2001 (6) SCC 50., that on the assurance of the Chief Minister made in the Legislative Assembly, it was taken as a Government decision and Commissions of Inquiry was appointed. In the present case, such procedure having been followed, a statement having been made by the Chief Minister of the State in the Tamil Nadu Legislative Assembly, no mala fide could be imputed on any individual. Such suggestion of mala fide also cannot be accepted as no individual has been impleaded as party by name in the present proceeding.

14. We find no merits in the present writ petition. Accordingly, the same is dismissed. Consequently, connected miscellaneous petition is also dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

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LATER (2.55 P.M.) :

After pronouncement of the judgment in open court, learned counsel appearing on behalf of the petitioner made request to direct the Commission not to proceed in the matter, as the petitioner intends to move before the Supreme Court against the judgment in question, but he is not in a position to move immediately, as the Supreme Court is closed for winter vacation. Learned counsel appearing on behalf of the State and the Commission submitted that such request could be made by the petitioner before the Commission.

We have noticed the submission as made by the parties. In the facts and circumstances, to enable the petitioner to move the Appellate Court, we direct that the Commission should not fix any date for hearing prior to 25th Jan., 2008. Thereafter, it may do so taking into consideration the order of the Appellate Court, if any.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

GLN

To

1. The Chief Secretary to Government
   Government of Tamil Nadu
   Fort St. George
   Chennai 600 009.

2. The Secretary
   Justice K.P.Sivasubramaniam
   Commission of Inquiry
   Coouam House
   Omandurar Government Estate
   Swamy Sivananda Salai
   Chennai 600 002.

1 cc to M/s. N. Jothi, Advocate, Sr. 74589
1 cc to the Government Pleader, sr. 74615

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